(1)

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp.

QUESTIONS PRESENTED

I.

WHETHER, IN A VAGUENESS OR SUBSTANTIVE DUE PROCESS CHALLENGE TO STATE ABORTION REGULATIONS, CLAIMANTS SEEKING TO INVALIDATE THE REGULATIONS IN ALL OF THEIR APPLICATIONS MUST ESTABLISH "NO SET OF CIRCUMSTANCES" IN WHICH THE REGULATIONS MAY PERMISSIBLY BE APPLIED OR MUST ESTABLISH THAT IN A "LARGE FRACTION" OF THEIR APPLICATIONS THE REGULATIONS WOULD BE IMPERMISSIBLE?

II.

WHETHER, ON ITS FACE, OHIO'S REGULATION OF PARTIAL-BIRTH ABORTIONS PLACES AN UNDUE BURDEN ON A WOMAN'S DUE PROCESS RIGHT TO TERMINATE A PREGNANCY?

III.

WHETHER, ON ITS FACE, OHIO'S REGULATION OF POST-VIABILITY ABORTIONS IS IMPERMISSIBLY VAGUE (BECAUSE IT REQUIRES THAT A PHYSICIAN EXERCISE "REASONABLE" MEDICAL JUDGMENT CONCERNING THE VIABILITY OF A FETUS OR THE MEDICAL NECESSITY FOR AN ABORTION) OR VIOLATES SUBSTANTIVE DUE PROCESS (BECAUSE IT CONTAINS A MATERNAL HEALTH EXCEPTION THAT REQUIRES THE RISK OF PHYSICAL INJURY)?

LIST OF PARTIES

Petitioners are George Voinovich, Governor, State of Ohio, Betty D. Montgomery, Attorney General, State of Ohio and Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney.

Respondents are Women's Medical Professional Corp. and Martin Haskell, M.D.

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PETITION FOR A WRIT OF CERTIORARI

Ohio Governor George Voinovich, Ohio Attorney General Betty Montgomery, and Montgomery County, Ohio, Prosecutor, Mathias Heck, Jr., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix ("A-") 1) has not yet been officially reported but soon will be. 1997 U.S. App. LEXIS 32232; 1997 FED App. 0336P. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division (A-73) is reported. 911 F. Supp. 1051.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit (A-1) was entered on November 18, 1997. Jurisdiction in this Court exists under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATUTORY PROVISIONS INVOLVED

See Attachment to Petition.

STATEMENT

I. The Partial-Birth Abortion Procedure.

Partial-birth abortions represent a recent innovation in late-term abortion techniques. The first medical literature on the subject did not appear until 1992, when respondent Dr. Martin Haskell presented a paper entitled "Dilation and Extraction for Late Second Trimester Abortion" to the National Abortion Federation. A resident of Ohio who performs late-term abortions there, Dr. Haskell described a new method for performing abortions after the 20th week of gestation, and usually between the 20th and 24th week.

The three-day procedure works in the following manner. During the first two days, a doctor inserts laminaria into the woman's cervix to dilate it. On the third day, after the cervix has been dilated, the doctor uses forceps to grasp the leg of the fetus, then pulls the fetus feet-first into the woman's vagina. The doctor next removes the feet, legs, torso, and shoulders of the fetus from the vagina, so that only the upper part of the fetal head remains in the birth canal. At that point, as the head of the fetus remains lodged in the pregnant woman's body, the surgeon forces scissors into the base of the skull, places a suction catheter into the scissor hole and evacuates the skull contents. The suctioning of the brain is customarily what terminates the life of the fetus. To describe this novel procedure, Dr. Haskell coined the term "Dilation and Extraction" or "D&X." Dr. Haskell also explained that the D&X procedure differs from the classic dilation and evacuation (D&E) procedure because it does not rely upon dismemberment to remove the fetus from the woman's body.

The record in this case indicates that the D&X (or partial-birth) procedure is not commonly used by abortion practitioners. Indeed, the American Medical Association has

recently concluded that the partial-birth method for aborting a fetus "'is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development.'" A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997).

II. The Ohio Statutes.

In 1995, through their representatives in the legislature, the citizens of Ohio responded to the use of the D&X procedure in the State and more generally to the availability of post-viability abortions in the State. By a cumulative margin of 110-19, the Ohio General Assembly passed House Bill 135 (the "Act"), which Governor Voinovich promptly signed into law. The legislative "intent" of the bill, according to the terms of the enactment, was "to prevent the unnecessary use of a specific procedure used in performing abortions . . . based on a state interest in preventing unnecessary cruelty to the human fetus." 1995 H. 135, section 3. To that end, the law places limits on the availability of partial-birth and post-viability abortions.

A. The Restriction on Partial-Birth Abortions.

In order to "prevent[] unnecessary cruelty to the human fetus," 1995 H. 350, section 3, the statute restricts the use of the D&X procedure, which involves "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." R.C. 2919.15(B). While the regulation applies to all abortions, whether the fetus is viable or not, it does not constitute an absolute ban. Individuals violate the restriction only when they "knowingly" perform the procedure and only when there is no medical urgency for performing it -- in other words, only when other procedures for

terminating the pregnancy would place the health of the mother at risk. R.C. 2919.15(B) & (C); R.C. 2307.51(C).

B. The Restriction on Post-Viability Abortions.

The legislation also limits the availability of abortions once the fetus has become capable of living outside the mother's womb. Under the statute, "[n]o person shall purposely perform" an abortion "if the unborn human is viable" unless one of two conditions exist. R.C. 2919.17(A). The first occurs when the abortion is performed by a physician who determines "in good faith and in the exercise of reasonable medical judgment" that the abortion is "necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* The second occurs when the abortion is performed by a physician who determines "in good faith and in the exercise of reasonable medical judgment" that the "unborn human is not viable." *Id.* In addition, any post-viability abortions done consistently with these requirements must also comply with several other procedural rules. *See* R.C. 2929.17(B).

For purposes of the post-viability ban, a fetus of at least 24 weeks is rebuttably presumed to be viable. R.C. 2919.17(C)(1). Once a fetus has reached 22 weeks, however, Ohio requires a physician to "perform a medical examination of the pregnant woman" to determine whether the fetus is viable, unless a medical emergency prevents such testing from being done. R.C. 2919.18(A). The statute defines "medical emergency" as a "condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgment, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or

to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create." R.C. 2919.16(F). In turn, R.C. 2919.16(J) defines a "serious risk of the substantial and irreversible impairment of a major bodily function" as "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions: 1) pre-eclampsia; 2) inevitable abortion; 3) prematurely ruptured membrane; 4) diabetes; 5) multiple sclerosis." Attempting to ensure that the provision complied with federal law, the General Assembly directed that this definition "be construed according to the interpretation given to that phrase in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2822 (1992), and *Planned Parenthood v. Casey*, 947 F.2d 682, 699-702 (3rd Cir. 1991)." *See* Section 4 of H.B. 135.

The Act, in each of these respects, was scheduled to take effect on November 14, 1995.

III. Procedural History

Yet, on October 27, 1995, before the legislation had a chance to go into operation, respondents filed this action, seeking both declaratory and injunctive relief. Respondents are the Women's Medical Professional Corporation, which operates clinics and provides abortion services in Ohio, and Dr. Haskell who originated the D&X abortion procedure and has used it to perform abortions between 20 and 24 weeks. Respondents claimed that the Act was unconstitutional on its face under two primary theories. They asserted that the partial-birth regulation imposes undue burdens on a woman's right to

terminate a pregnancy under the due process clause. And they claimed that the Act's post-viability regulations are impermissible vague and also violate substantive due process.

The district court (Rice, J.) granted respondents' request to restrain the Act from going into effect. He then entered a preliminary, and later a permanent, injunction prohibiting the entire Act from becoming law. The State appealed.

IV. The Sixth Circuit's Decision.

In a 2-1 decision (Brown, *Kennedy*, *Boggs* (dissent)), the Sixth Circuit affirmed.

A. Standard For Assessing Facial, Pre-Implementation Challenge.

In addressing the appropriate standard for reviewing a facial challenge to a statute, the court forthrightly acknowledged a cloud of uncertainty on the issue. On the one hand, the Sixth Circuit observed, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), struck a spousal notification provision in the context of a facial challenge because the record showed that "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." A-12 (quoting *Casey*, 505 U.S. at 895). Yet in several other abortion decisions, the Sixth Circuit observed, the Court has applied the stringent *Salerno* test for assessing a facial challenge, requiring the complainant to "establish that no set of circumstances exists under which the Act would be valid." A-12 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 514 (1990)).

In the end the Sixth Circuit applied the less stringent standard, concluding that the traditional test for assessing an across-the-board challenge to a statute does not apply. "Although *Casey* does not expressly purport to overrule *Salerno*," the lower court held (A-12), "in effect it does." The court also applied this standard (A-18 to A-19, A-39 n.18) in assessing respondents' vagueness challenge.

B. Invalidation of Ohio's Partial-Birth (D&X) Regulation.

Applying this standard, the Sixth Circuit concluded that Ohio's regulation of partial-birth abortions imposes an undue burden on a woman's right to terminate a pregnancy. A-28-29, 32. The central flaw in the restriction, from the court's perspective, was definitional, namely that the statute's description of the restricted procedure covers "the most commonly used second trimester procedure," the D&E procedure. A-29. Because Ohio defines the restricted procedure to involve "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain," R.C. 2919.15(A), and because "some physicians" implement the D&E procedure by "using suction to remove the intracranial contents" of a dismembered fetus, the court concluded that the definition applies equally to both types of abortion procedures. A-22, A-33. The overlap, the court determined, places an undue burden on a woman's right to terminate her pregnancy because the law limits the availability of the most common method of second trimester abortion. A-28. Finally, the court chose not to apply its ruling exclusivly to pre-viability abortions. Taking the view that Ohio's regulation of partial-birth abortions does not distinguish between pre- and post-viability abortions, it concluded that it "essentially would have to rewrite the Act in order to create a provision which could stand by itself." A-32.

C. Invalidation of Ohio's Restriction on Post-Viability Abortions.

The court next determined that the medical necessity and medical emergency exceptions to the ban on post-viability abortions (which require the physician to determine "in good faith and in the exercise of reasonable medical judgment" that the exception exists) were unconstitutionally vague because they lacked an appropriate *mens rea* requirement. A-34. What troubled the court was that other physicians could determine "after the fact" that the performing doctor's medical judgment was not reasonable, and therefore doctors could be held liable even when they acted in good faith and according to their own best medical judgment. A-35.

Lastly, the court invalidated the maternal health exception because it concluded that it applies only to physical, and not mental, health risks. Though agreeing that *Casey* "does suggest" a maternal health exception limited to physicial health exceptions "is constitutional," A-42, it found *Casey* distinguishable because it involved a regulation that "only delayed abortions" while the Ohio regulation "bans post-viability abortions." A-44.

D. The Dissent.

Judge Boggs disagreed with the majority's conclusion that the entire Act offends due process. As a general matter, rather than "interpret[ing] statutes so as to avoid difficult constitutional questions," he complained that "the majority's opinion strains to interpret Ohio's partial-birth abortion statute so as to make the burden imposed by Ohio's ban on dilation-and-extraction ("D&X") abortions, and on most post-viability

abortions, appear 'undue.'" A-53-54. He also disagreed with his colleagues' extension of the overbreadth doctrine from the First Amendment into the area of vagueness and substantive due process challenges. A-67-68.

Moving from the general to the specific, Judge Boggs took issue with the majority's invalidation of the D&X regulation. In his view, "plaintiffs are attempting to create ambiguity where there is none," as shown by their refusal at oral argument to "be pinned down as to any set of words that would . . . acceptably define the procedure." A-59-60. Instead, the dissent remarked, Ohio had authority to regulate such an unusual procedure, particularly since the American Medical Assocation has concluded that it "'is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development.'" A-59 (quoting AMA Board of Trustees Statement of May 19, 1997). Nor did the statute, in the dissent's view, fail to put doctors on "fair notice as to what is encompassed by the ban," above all because the D&E procedure "does not terminate the pregnancy by purposely inserting a suction device into the fetal skull," but is "only a byproduct of the abortion procedure already performed" and because "[t]he testimony at the hearing in the district court clearly demonstrates that doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute." A-61. At any rate, even if there were ambiguity in the statute, he said, the court should have invoked the rule of lenity to resolve it. A-60 n.2.

Judge Boggs also did not think that Ohio's restriction on post-viability abortions was impermissibly vague. The lack of a scienter requirement for the "medical necessity" and "medical emergency" provisions, or for that matter any penal statute, the dissent urged, does not render a statute unconstitutionally vague. A-62. Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in

appropriate medical judgment." A-63 (quoting *Casey*, 505 U.S. at 879). And "[i]t is difficult to see how a medical judgment can be deemed 'appropriate' if it is, beyond a reasonable doubt, not a reasonable judgment." A-63.

On the question whether the post-viability ban must accommodate non-physical factors, Judge Boggs believed that the legislature's instruction to construe the medical necessity or emergency instructions in line with *Casey* revealed an earnest (and, he thought, accurate) attempt to comply with the Constitution. A-65. At any rate, he also concluded that the majority's requirement that such a law must encompass "severe risks of mental and emotional harm" was in fact met by the "broad" language used by the legislature concerning the "impairment of a major bodily function." A-65.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Exacerbates Several Conflicts Of Authority.

The first reason for reviewing the Sixth Circuit's decision is the burgeoning conflict of authority on the appropriate standard for assessing a pre-implementation facial challenge to an abortion regulation. The initial point of disagreement stems from Supreme Court precedent. Not just *Salerno*, but several abortion decisions as well, *see Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 514 (1990), *see also Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring in part and concurring in the judgment), have applied a "no set of circumstances" test in assessing facial challenges to a statute. By contrast, *Casey* appears to permit

relief in such challenges so long as the claimant shows that the statute creates an undue burden on the right to terminate a pregnancy in a "large fraction" of the statute's applications. 505 U.S. at 895.

In the aftermath of *Casey*, several Justices have written separately to express their views on this precedential tension, some agreeing with the *Salerno/Rust/Akron Ctr.* characterization of the standard, others agreeing with the *Casey* characterization of the standard. Compare *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1583 (1996) (concluding that "*Salerno*'s rigid and unwise *dictum* has been properly ignored in subsequent cases") (Stevens, J., concurring in denial of certiorari), with *id.* at 1584-85 (*Casey* "did not purport to change this well-established rule") (quotation omitted) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari), and *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari).

The federal courts of appeals likewise have not been of one mind in determining whether *Casey* modifies the *Salerno/Rust/Akron Ctr.* standard. On one side of the conflict, three courts of appeals have agreed with the Sixth Circuit's conclusion that *Casey* effectively overrules *Salerno*. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (*dicta*).

In contrast to these appellate courts, the Fifth Circuit has concluded that *Casey* did not overrule the traditional rule for assessing facial challenges. *See Barnes v. Moore*, 970 F.2d

12, 14 n.2 (5th Cir.) ("we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes"), *cert. denied*, 506 U.S. 1021 (1992); *accord Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result"), *cert. denied*, 118 S. Ct. 357 (1997). Still another court of appeals, the Fourth Circuit, appears to be leaning toward the traditional rule, but has not yet had an opportunity so to hold. *See Manning v. Hunt*, 119 F.3d 254, 268-69, n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive").

Whether the reader is partial to one side of this debate or the other, it is difficult to avoid the conclusion that the question "cries out for [the Court's] review." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1584 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). Nor can there be any doubt that this case squarely presents the issue, as the district court admitted that plaintiffs had "not shown that 'no set of circumstances' exists under which the ban would be valid." A-91.

On top of the *Salerno/Casey* division of authority presented by this case rests another split, which the Sixth Circuit has now deepened as well. In assessing facial attacks on allegedly vague statutes, courts have generally applied the traditional *Salerno* rule, which is to say they will reject the challenge unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). The Sixth Circuit, however, took a different tack in assessing claimants'

vagueness challenge to the restriction on post-viability abortions. "Since we have already held that *Salerno* does not apply in the abortion context," the court held, "it is enough that the statute may be unconstitutionally applied to a large fraction of women for whom the law is relevant." A-39-40 n.18.

Right or wrong, this interpretation extends the *Casey* overbreadth standard to an area of abortion regulations not even subject to undue-burden review (post-viability regulations) and applies the principle to a new constititutional claim (vagueness). In addition to *Hoffman Estates*, this analysis diverges from several other Supreme Court precedents. *See, e.g., Chapman v. United States*, 500 U.S. 453, 467 (1991) ("vagueness claims must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by the statute"); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). To be fair, however, two precedents from this Court provide ostensible support for this analysis. In contrast to the *Hoffman Estates/Salerno* rule, some cases seem to apply an overbreadth analysis whenever there is any "constitutionally protected conduct" at issue. *See Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Colautti*, 439 U.S. at 394-401. Of course, this approach directly conflicts with *Hoffman Estates*, as the Sixth Circuit itself admitted in grappling with the question. *See* A-19 ("At times the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application").

In addition, several circuits courts have applied a different standard of review from the one applied by the Sixth Circuit, some going so far as to suggest that a facial vagueness

claim may never be brought. *See, e.g., United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997) ("[a] vagueness challenge . . . cannot be aimed at the statute on its face but must be limited to the application of the statute to the particular conduct charged"); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996) (plaintiffs can only succeed "on a facial vagueness challenge if they could show that the law is impermissibly vague in all of its applications") (quotation omitted); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (a facial challenge on vagueness grounds "is a claim that the law is invalid in toto -- and therefore incapable of any valid application") (internal quotation omitted); *Stoianoff v. Montana*, 695 F.2d 1214, 1220 (9th Cir. 1983) ("All that we must find to sustain the facial constitutionality of the Act is a single clear application of the Act to the appellant"). *Cf. New England Accessories Trade Assn, Inc. v. City of Nashua*, 679 F.2d 1, 5 (1st Cir. 1982) ("unless the enactment implicates constitutionally protected conduct, we can invalidate it only if it is impermissibly vague in all of its applications").

The Sixth Circuit's invalidation of the partial-birth and post-viability abortion regulations also conflicts with this Court's landmark decision in *Casey*. *See infra*. While this conflict has not yet spread to the lower courts, that fact surely does not diminish the certworthiness of at least the first question presented and in our view the appropriateness of promptly reviewing all three questions.

Perhaps the most important question in the petition -- the proper constitutional standard for assessing these types of challenges -- is the one that has most deeply divided the lower courts and has done all the percolating that any legal issue needs to become ripe for review. In view of the sizeable number of partial-birth abortion regulations being challenged throughout the country, *see infra*, and in view of the standard

of review's impact on those claims, it would seem odd to continue to force the lower courts to issue rulings in these cases in the absence of much-needed guidance from the Court on this vital point. In the last analysis, the first question presented calls out for immediate review in light of the substantial conflict of authority over its resolution; and the second and third questions merit prompt review to place the standard-of-review issue in context and resolve the tension between the Sixth Circuit's merits decision and *Casey*.

II. The Sixth Circuit's Decision Raises Important Federal Questions.

Even aside from the conflicts of authority implicated by the petition, the significance of the questions presented in and of itself warrants review. By any relevant standard, the constitutionality of legislation restricting partial-birth and post-viability abortions, to say nothing of the standard for assessing such laws, presents important, indeed exceedingly important, federal questions. The Court has not yet considered the validity of limitations on partial-birth abortions. Nor has it determined whether a mental health exception is constitutionally required when it comes to restrictions on post-viability abortions. And, for five years now, the lower courts have remained in limbo over the appropriate standard for reviewing these claims. Add to this the fact that Ohioans are far from the only interested participants in these debates, and it becomes clear that the petition presents several certworthy federal questions.

In enacting these laws, Ohio joined a legion of other States that have regulated one or the other of these procedures, and sometimes both. All told, 17 States (including Ohio) regulate partial-birth abortions. *See* 1997 Ala. Acts 485; Alaska Stat. 18.16.050; Ariz. Rev. Stat. Ann. 13-3603.01; 1997 Ark. Acts 984; Ga Code Ann. 16-12-144; Ind. Code Ann. 16-18-2-267.5, 16-34-2-1(b); 1997 La. Acts 906, La. R.S. 14:32:9

and 40:1299.35.3; Mich. Comp. Laws Ann. 333.16221(l) & (m), 333.16226, 333.17016, 333.17516; Miss. Code Ann. 41-41-73; Mont. Code Ann. 50-20-401; Neb. Rev. Stat. 28-325, 28-326(9) & 71-148; R.I. Gen. Laws 23-4.12-1, 23-4.12-2, 23-4.12-3, 23-4.12-4, 23-4.12-5 and 23-4.12-6; S.C. Code Ann. 44-41-85; S.D. Codified Laws 34-23A-27 through 34-23A-32; Tenn. Code Ann. 39-15-209; Utah Code Ann. 76-7.310.5.

In addition, a host of States (again including Ohio) and the District of Columbia regulate post-viability abortions. Of these laws, three contain maternal health exceptions that parallel Ohio's. *See* 1997 Ala. Acts 442; Ind. Stat. Ann. 16-34-2-1(3) and 16-34-2-3; 18 Pa. C.S.A. 3211. Several of the statutes contain maternal health exceptions, yet do not define "health." *See* Ariz. Rev. Stat. Ann. 36-2301.01(A); Ark. Code Ann. 20-16-705; Cal. Health and Safety Code 123405, 123410, 123415, 123435; Conn. Gen. Stat. Ann. 19a-602(b); D.C. Code 22-201; Fla. Stat. Ann. 390.0111(1) & (4); Ga. Code Ann. 16-12-141(C); Ill. Comp. Stat. Ann., Ch. 720, 510/5; Iowa Code Ann. 707.7; Ky. Rev. Stat. Ann. 311.780; La. Stat. Ann. 1299.35.4; Maine Rev. Stat. Ann. Title 22, 1598; Minn. Stat. Ann. 145.412(3); Mo. Stat. Ann. 188.030(1); Mont. Code Ann. 50-20-109(c); Neb. Rev. Stat. 28-329; N.C. Gen. Stat. 14-45.1; Okla. Stat. Ann. 1-732; S.D. Cod. Laws 34-23A-5; Tenn. Code Ann. 39-15-201(C)(3); Wis Stat. Ann. 940.15; Wyo. Stat. 35-6-102. And several of the statutes contain a "life of the mother" exception. *See* Del. Code Ann., Title 24, 1790(a)(1) & (b)(1); Idaho Code Ann. 18-608(3); Kansas Stat. Ann. 65-6-703; New York Pen. Law 125.00, 125.05, 125.45; R.I. Gen. Laws Ann. 11-23-5.

It ought to be enough to show the substance of a constitutional question that the decision below nullifies the democratic efforts of an overwhelming majority of Ohioans to express their collective concerns about partial-birth and post-viability abortions. But here there is more. Sixteen other States

have enacted partial-birth abortion laws, with most of them already under judicial attack, and all of them vulnerable under the analysis adopted by the Sixth Circuit. Similar problems plague the other State laws that limit post-viability abortions and employ the *Casey*-approved "substantial and irreversible impairment of a major bodily function" language to protect the pregnant woman's health. Moreover, the multitude of States that have enacted post-viability laws -- including those that do not contain explicit mental health exceptions for the mother -- need this Court's guidance on the meaning of the required "health" exception in the context of a ban on post-viability abortions.

Nor has the medical community had insufficient time to study these issues. The American Medical Association, for example, recently took a vigorous public stand against use of the partial-birth procedure, and in doing so advocated a federal ban on partial-birth abortions. Its Board of Trustees issued a statement explaining that it "is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." A-59. The position later received the endorsement of the entire AMA House of Delegates. *Id.*

A final word deserves consideration. The Court has said that the States have an interest in the potential life that comes with all pregnancies, and a special right to safeguard that interest once the prospects for life outside the womb move from hope to relative certainty. At the same time, the Court has made clear that the States must honor a woman's right to terminate a pregnancy pre-viability and must not shortchange her health interests when restricting abortions after viability. A law designed to regulate an abortion procedure that to many seems gratuitously cruel and offensive, or one that limits the availability of any procedure once a fetus has developed to the point where it can become a child by the act of delivery, surely

advances these interests, and does so in a way that respects due process. But whether we are right or wrong at this stage is (at least partly) beside the point: The critical issue is that no one can tenably dispute that these issues have irreversible consequences for women and potential children, and those consequences ought to satisfy any and all calibrations of federal importance.

III. The Sixth Circuit Erred In Striking The Ohio Law.

The Sixth Circuit, we believe, also erred in invalidating the Act in its entirety. This, too, favors review.

A. The Court of Appeals Applied The Wrong Standard For Assessing Facial Challenges to an Abortion Statute.

Undue burden. In assessing the appropriate standard for reviewing an undue burden challenge to a partial-birth abortion regulation, the Sixth Circuit overlooked the core premise for distinguishing between facial and as-applied challenges. Federal courts have a duty to try to save, not destroy, State legislation. *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990). And a standard of review that allows entire statutes to be nullified before the State has had a chance to implement them and before the presumption of constitutionality has been countered with respect to each prospective application of the statute turns the passive virtue of this age-old limitation on judicial review into an active vice. Outside the context of the First Amendment where litigants may overcome the presumption of constitutionality of an entire statute by demonstrating substantial problems in its application, the Court has long held

that a facial challenge may succeed only after the claimants have met their burden of showing "no set of circumstances" in which the law may be constitutionally applied. *Salerno*, 481 U.S. at 745.

Nor is it clear why this "traditional rule" (*New York v. Ferber*, 458 U.S. 747, 767 (1982)) ought suddenly to be interred. No studies have been done showing that the rule leads to unfair consequences. Nor have any great hardships arisen through the Court's frequent application of the rule in the abortion context, *see Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Ohio v. Akron Ctr. For Reprod.Health*, 497 U.S. 502, 514 (1990), *see also Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and in other settings, *see Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995), *Reno v. Flores*, 507 U.S. 292, 301, 309 (1993), *cf. Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2355 (1997) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.). The distinction between facial and as-applied challenges is as time honored as it is widespread, and ultimately reflects the benefit of the doubt that federal courts customarily give State officials, namely that they presumably will obey, not offend, their duty to uphold the Constitution in implementing a statute. For the same reason, the Court has resisted invitations to invalidate statutes based upon a "hypothetical possibility" of unconstitutional application in the future. *General Motors v. Tracy*, 117 S. Ct. 811, 830 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 760-61 (1976).

Even on the facts of this case, it remains unclear what harm the traditional rule would engender. In the court of appeals' view, the State's definition of a partial-birth abortion impermissibly covered the more traditional D&E procedure. Taking that for granted, who suffers if the court identifies this

constitutional defect, then rejects the facial challenge on the ground that the flaw does not infect the entire statute -- for example, because the statute still may be applied to the D&X procedure itself or to the D&E procedure in the context of post-viability abortions? What State would not get the message? Surely no State would start regulating pre-viability D&E abortions after such a decision, least of all Ohio, which had no intention of banning this customary procedure in the first place, which would have no objection to a limiting interpretation of the law, and whose Attorney General has never suggested that the statute may be construed in this unusual way. What is more, State officials who continued to apply the statute in unconstitutional ways would soon feel the deterrent sting of section 1988 attorney fees, not to mention civil rights actions brought against the officials in their individual capacity and with little likelihood of a qualified immunity shield.

Nor, for like reasons, will this approach imperil the availability of constitutionally-permitted abortions. If anything, these considerations will likely prompt State officials to under-enforce, not over-enforce, laws that have been invalidated in certain applications. But either way, wary physicians may still bring declaratory judgment actions to determine whether the law applies in a given setting and if so whether that application withstands constitutional scrutiny. Or, if worst comes to worst, they may still bring an as-applied challenge to the law if it is unfairly used against them, at which time the rule of lenity will govern (and limit) any ambiguous applications of the law.

That leaves the Court's decision in *Casey*, which as interpreted by the court of appeals silently abandoned not just *Salerno* but a long tradition of decisions requiring claimants to establish no set of circumstances in which the law may

permissibly be applied before striking the provision in its entirety. No doubt, as the courts of appeals and several members of this Court have recognized, there seems to be tension between the two cases, at least at first blush.

But, in truth, *Casey* and *Salerno* are compatible. The traditional *Salerno* requirement has long been met when a statute "operates on a fundamentally mistaken premise." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984). Just such a "mistaken premise" infected the spousal-notification provision in *Casey*: The requirement that a woman notify her husband before seeking an abortion rested on the flawed assumption that "a husband's interest in the potential life of the [unborn] child outweighs a wife's interest [to choose to have an abortion]." *Casey*, 505 U.S. at 898. Because the whole spousal-notification provision rested on this mistaken premise, the statute was indeed unconstitutional in all of its applications. The *Munson* principle thus reconciles *Casey* and *Salerno*.

Vagueness. No less erroneous was the court of appeals' extension of its *Casey* interpretation to facial vagueness claims. Of course, *Casey* was not a vagueness case. And, in the Court's vagueness decisions, it has followed an essentially unbroken tradition in concluding that such challenges cannot succeed unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 495. Unless the legislation is so vague as to "proscribe[] no comprehensible course of conduct at all," *Powell*, 423 U.S. at 92, which plainly was not the case with Ohio's requirement that the physician act in good faith and exercise reasonable medical judgment in determining viability or medical necessity, the traditional test applies. *See Chapman*, 500 U.S. at 467; *Maynard*, 486 U.S. at 361; *Powell*, 423 U.S. at 92; *Mazurie*, 419 U.S. at 550.

True, some cases have loosely suggested that the overbreadth rule applies when the statute implicates "constitutional," as distinct from First Amendment, freedoms. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983). But virtually all of these cases, including *Kolender* itself, involved First Amendment rights, suggesting that the term "constitutional" was simply shorthand for First Amendment rights. The one exception is *Colautti v. Franklin*, a pre-*Casey* abortion decision whose broad sweep has since been questioned by several members of the Court. *See Webster*, 492 U.S. 490 (opinion of Rehnquist, C.J., joined by White, J., and Kennedy, J.)

B. The Court of Appeals Erred in Striking Ohio's Partial-Birth (D&X) Abortion Regulation.

In addition to applying the wrong standard of review, the court of appeals committed reversible error in finding that Ohio's regulation of partial-birth abortions unduly burdens a woman's right to terminate a pregnancy. The court did not rule, as indeed it could not have ruled, that the Constitution forbids States from restricting the availability of this unusual procedure. Instead, the court construed Ohio's definition of the D&X procedure to encompass the more common (and constitutionally legitimate) D&E procedure. But the Act simply cannot sustain this analysis, as it contains a series of unmistakeable inferences (if not outright directions) that the statute bans the one procedure but not the other.

First, two of the statutes created by the Act label the proscribed procedure in no uncertain terms, one titled "Dilation and Extraction Procedure," 2919.15, the other titled "Civil

Action for Dilation and Extraction Procedure," 2307.51. The relevant text of the statutes proceeds to identify the D&X procedure by name more than a dozen times, while the D&E procedure is nowhere mentioned and nowhere banned.

Second, by its terms, Ohio's definition of the D&X procedure cannot plausibly cover the distinct D&E procedure. The statute describes the D&X procedure as covering (1) "the termination of a human pregnancy" by (2) "purposely inserting a suction device into the skull of a fetus to remove the brain." Yet the late-term D&E procedure does not end a pregnancy by using a suction device; it ends the pregnancy by dismembering the fetus and then using a suction device to remove the scattered remains. Nor does the D&E procedure involve a "purpose[ful]" insertion of a suction device into the fetal skull. It involves dismemberment of the fetus followed by anything but purposeful suctioning of the fetal remains. The D&X procedure, by contrast, is designed precisely to deliver most of the body of the fetus in order to have access to the head so that the physician may "purposely" insert a suction device into the brain.

Third, the goal of the statute removes any doubt as to what was proscribed: The legislators designed the D&X regulation "to prevent the *unnecessary* use of *a specific procedure* used in performing abortions . . . based on a state interest in preventing unnecessary cruelty to the human fetus." 1995 H. 350, section 3 (emphasis added). The D&X procedure plainly is "unnecessary," as suggested by its infrequent use, its undistinguished pedigree, and its disapproval by the AMA. Yet the D&E *is* constitutionally necessary because (as the court of appeals itself found) it is the most common form of second trimester abortion. And a regulation concerning "*a* specific procedure" surely means just one procedure, not two, and most assuredly the one repeatedly mentioned by name throughout the Act. Finally, and perhaps most paradoxically, the very person

who challenges the overlap between the D&E and D&X procedures, respondent Dr. Haskell, is precisely the person who coined the term D&X in order to distinguish between the two procedures. In using Dr. Haskell's definition, Ohio came closer to establishing a bill of attainder (a law that suffers from too much specificity) than to establishing an overly-broad statute that unduly burdens a woman's due process rights.

But even if each of these pieces of statutory and record evidence do not support the Ohio Attorney General's, the Ohio Governor's, and the relevant Ohio County Prosecutor's interpretation of the statute, which is that the law does not restrict D&E abortions, the most one can say is that the statute is ambiguous. Yet under those circumstances, the court's job is not to invalidate the law, but to adopt the narrower interpretation of it under the rule of lenity. *United States v. R.L.C.*, 503 U.S. 291, 305-13 (1992).

C. The Court of Appeals Erred in Concluding that the Good-Faith and Reasonable-Medical-Judgment Exceptions to the Post-Viability Ban Were Impermissibly Vague.

The court of appeals also erred in reviewing Ohio's requirement that physicians act in good faith and exercise reasonable medical judgment in determining the viability of a fetus and in making a finding of medical necessity before aborting a fetus who could live outside the womb. In concluding that these provisions were impermissibly vague, the court focused on the fact that they did not have a *mens rea* requirement.

First, and most conspicuously, the statute *does* contain a *mens rea* requirement. Section 2919.17 explicitly provides that one must act "purposely" in order to break the law. This

fact by itself distinguishes the Ohio law from the one at issue in *Colautti v. Franklin*, 439 U.S. 379 (1979), which lacked any state-of-mind element. *Id.* at 381 n.1.

But, second, even if the statute lacked a *mens rea* requirement (which it does not), that alone does not render a law unconstitutionally vague. Laws frequently proscribe unreasonable conduct, and permissibly so. "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Nor in a criminal setting is unreasonableness by itself enough to obtain a conviction; the jury must find that the individual's medical judgment was unreasonable "beyond a reasonable doubt," a daunting standard for any prosecutor to meet. Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in appropriate medical judgment," *Casey*, 505 U.S. at 879, a similar standard of care but one that is necessary if laws of this sort are to have any effect.

Nor does the pre-*Casey* decision in *Colautti v. Franklin*, 439 U.S. 379 (1979), support the lower court decision. *Colautti* specifically reserved the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." *Id.* at 396.

Finally, it seems unfair to criticize States for using unreasonable medical judgment as a touchstone for liability in this area. The Court's judgments about State regulations in this setting after all each turn on reasonableness balancing, what necessarily comes down to difficult distinctions between "undue" burdens on a women's ability to terminate a pregnancy

and permissible burdens on that right prompted by the State's interest in protecting potential life. When States follow suit in earnestly trying to regulate in a constitutional manner in this area, it is not because they are trying to trap the unwary. It is because clear lines are hard to find and because the price for complete certainty is invariably overprotection of one of these interests and neglect for the other.

D. The Court of Appeals Erred In Concluding That the Ohio Post-Viability Abortion Regulations Violate Substantive Due Process Because They Do Not Contain a Mental Health Exception For the Mother.

The final error committed by the court of appeals stems from its review of Ohio's maternal health exception to the ban on post-viability abortions. In holding that such exceptions must cover the mental health of the woman in order to comply with substantive due process, the court not only made new law but also failed to follow several pertinent teachings of *Casey*.

Casey specifically upheld a maternal health exception to an abortion regulation that was substantively identical to Ohio's, and indeed was the source for it. *See* 505 U.S. at 879-81. By upholding the Pennsylvania formulation of the maternal-health exception ("substantial and irreversible impairment of a major bodily function"), the Court plainly was blessing an identically-worded provision for exempting women from other abortion regulations. In order to remove any doubt on this score, the Ohio legislature expressly provided in the terms of the Act that it wanted the phrase to obtain the same construction as the Pennsylvania statute. In using the phrase "serious risk of the substantial and irreversible impairment of a major bodily function," "it is the intent of the General

Assembly that the phrase be construed according to the interpretation given to that phrase in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822 (1992), and *Planned Parenthood v.* Casey, 947 F.2d 682, 699-702 (3d Cir. 1991)." H. 135, section 4, 121st Gen. Ass. (Ohio 1995). What more, in short, could the State have done to ensure that it was acting constitutionally in this area?

Nor does *Doe v. Bolton*, 410 U.S. 179 (1973), another pre-*Casey* decision relied upon by the court of appeals, change matters. *Doe* addressed a statute that barred abortions unless a doctor determined "an abortion is necessary." *Id.* at 183. In doing so, it rejected a vagueness challenge to the law because the broad wording of the statute expanded the choices of pregnant women by authorizing an abortion for a whole host of reasons, including emotional health. That conclusion has little application here.

In the last analysis, the court of appeal's mistaken application of this Court's precedents also supports the writ.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the writ.

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ATTACHMENT -- OHIO STATUTORY PROVISIONS

2919.15 Dilation and extraction procedure

(A) As used in this section, "dilation and extraction procedure" means the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

(B) No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman.

(C)(1) It is an affirmative defense to a charge under division (B) of this section that all other available abortion procedures would pose a greater risk to the health of a pregnant woman than the risk posed by the dilation and extraction procedure.

(2) Notwithstanding section 2901.05 of the Revised Code, if a person charged with a violation of division (B) of this section presents prima facie evidence relative to the affirmative defense set forth in division (C)(1) of this section, the prosecution, in addition to proving all elements of the violation by proof beyond a reasonable doubt, has the burden of proving by proof beyond a reasonable doubt that at least one other available abortion procedure would not pose a greater risk to the health of the pregnant woman than the risk posed by the dilation and extraction procedure performed or attempted to be performed by the person charged with the violation of division (B) of this section.

(D) Whoever, violates division (B) of this section is guilty of performing an unlawful abortion procedure, a felony of the fourth degree.

(E) A pregnant woman upon whom a dilation and extraction procedure is performed or attempted to be performed in violation of division (B) of this section is not guilty of an attempt to commit, complicity in the commission of, or conspiracy in the commission of a violation of that division.

2919.16 Definitions

As used in sections 2919.16 to 2919.18 of the Revised Code:

(A) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(B) "Gestational age" means the age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman.

(C) "Health care facility" means a hospital, clinic, ambulatory surgical treatment center, other center, medical school, office of a physician, infirmary, dispensary, medical training institution, or other institution or location in or at which medical care, treatment, or diagnosis is provided to a person.

(D) "Hospital" has the same meanings as in section 2108.01, 3701.01 and 5122.01 of the Revised Code.

(E) "Live birth" has the same meaning as in division (A) of section 3705.01 of the Revised Code.

(F) "Medical emergency" means a condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgement, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

(G) "Physician" has the same meaning as in section 2305.11 of the Revised Code.

(H) "Pregnant" means the human female reproductive condition, that commences with fertilization, of having a developing fetus.

(I) "Premature infant" means a human whose live birth occurs prior to thirty-eight weeks of gestational age.

(J) "Serious risk of the substantial and irreversible

impairment of a major bodily function" means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:

(1) Pre-eclampsia;

(2) Inevitable abortion;

(3) Prematurely ruptured membrane;

(4) Diabetes;

(5) Multiple sclerosis.

(K) "Unborn human" means an individual organism of the species homo sapiens from fertilization until live birth.

(L) "Viable" means the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

2919.17 Terminating a human pregnancy after viability.

(A) No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless either of the following applies:

(1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(2) The abortion is performed or induced or attempted to be performed or induced by a physician and that physician determines, in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with division (a) of section 2919.18 of the Revised Code, that the unborn human is not viable.

(B)(1) Except as provided in division (B)(2) of this section, no physician shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman when the unborn human is viable and when the physician has determined, in good faith and in the exercise of reasonable medical judgement, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, unless each of the following conditions is satisfied:

(a) The physician who performs or induces or attempts to perform or induce the abortion certifies in writing that that physician has determined, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(b) The determination of the physician who performs or induces or attempts to perform or induce the abortion that is described in division (B)(1)(a) of this section is concurred in by at least one other physician who certifies in writing that the concurring physician has determined in good faith, in the exercise of reasonable medical judgment, and following a review of the available medical records of and any available tests results pertaining to the pregnant woman, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(c) The abortion is performed or induced to attempted to be performed or induced in a health care facility that has or has access to appropriate neonatal services for premature infants.

(d) The physician who performs or induces or attempts

to perform or induce the abortion terminates or attempts to terminate the pregnancy in the manner that provides the best opportunity for the unborn human to survive, unless that physician determines, in good faith and in the exercise of reasonable medical judgment, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

(e) The physician who performs or induces or attempts to perform or induce the abortion has arranged for the attendance in the same room in which the abortion is to be performed or induced or attempted to be performed or induced of at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn human immediately upon the unborn human's complete expulsion or extraction from the pregnant woman.

(2) Division (B)(1) of this section does not prohibit the performance or inducement or an attempted performance or inducement of an abortion without prior satisfaction of each of the conditions described in divisions (B)(1)(a) to (e) of this section if the physician who performs or induces or attempts to perform or induce the abortion determines, in good faith and in the exercise of reasonable medical judgment, that a medical emergency exists that prevents compliance with one or more of those conditions.

(C) For purposes of this section, it shall be rebuttably presumed that an unborn child of a least twenty-four weeks of gestational age is viable.

(D) Whoever violates this section is guilty of terminating or attempting to terminate a human pregnancy after viability, a felony of the fourth degree.

(E) A pregnant woman upon whom an abortion is performed or induced or attempted to be performed or induced in violation of division (A) or (B) of this section is not guilty of an attempt to commit, complicity in the commission of, or conspiracy in the commission of a violation of either of those divisions.

2919.18 Failure to perform viability testing on fetus.

(A)(1) Except as provided in division (A)(3) of this section, no physician shall perform or induce or attempt to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy unless, prior to the performance or inducement of the abortion or the attempt to perform or induce the abortion, the physician determines, in good faith and in the exercise of reasonable medical judgment, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing of gestational age, weight, lung maturity, or other tests of the unborn human that a reasonable physician making a determination as to whether an unborn human is or is not viable would perform or cause to be performed.

(2) Except as provided in division (A)(3) of this section, no physician shall perform or induce or attempt to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy without first entering the determination described in division (A)(1) of this section and the associated findings of the medical examination and tests described in that division in the medical record of the pregnant woman.

(3) Divisions (A)(1) and (2) of this section do not prohibit a physician from performing or inducing or attempting to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy without making the determination described in division (A)(1) of this section or without making the entry described in division (A)(2) of this section if a medical emergency exists.

(B) Whoever violates this section is guilty of failure to

perform viability testing, a misdemeanor of the fourth degree.

2307.51 Civil action for dilation and extraction procedure.

(A) As used in this section:

(1) "Dilation and extraction procedure" has the same meaning as in section 2919.15 of the Revised Code.

(2) "Frivolous conduct" has the same meaning as in section 2323.51 of the Revised Code.

(B)(1) A woman upon whom a dilation and extraction procedure is performed in violation of division (B) of section 2919.15 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who performed the dilation and extraction procedure.

(2) A woman upon whom a dilation and extraction procedure is attempted in violation of division (B) of section 2919.15 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorneys [*sic*] fees against the person who attempted to perform the dilation and extraction procedure.

(C) It is an affirmative defense in a civil action commenced pursuant to division (B)(1) or (2) of this section that all other available abortion procedures would pose a greater risk to the health of the woman upon whom the dilation and extraction procedure was performed or attempted to be performed than the risk posed by the dilation and extraction procedure that was performed or attempted to be performed.

(D) If a judgment is rendered in favor of the defendant in a civil action commenced pursuant to division (B)(1) or (2) of this section and the court finds, upon the filing of a motion under section 2323.51 of the Revised Code, that the commencement of the civil action constitutes frivolous conduct and that the defendant was adversely affected by the frivolous conduct, the court shall award in accordance with section 2323.51 of the Revised Code reasonable attorney's fees to the defendant.

2307.52 Civil action for terminating a human pregnancy after viability.

(A) As used in this section:

(1) "Frivolous conduct" has the same meaning as in section 2323.51 of the Revised Code.

(2) "Viable" has the same meaning as in section 2919.16 of the Revised Code.

(B)(1) A woman upon whom an abortion is purposely performed or induced or attempted to be performed or induced in violation of division (A) of section 2919.17 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who purposely performed or induced or attempted to perform or induce the abortion in violation of division (A) of section 2919.17 of the Revised Code.

(2) A woman upon whom an abortion is purposely performed or induced or attempted to be performed or induced in violation of division (B) of section 2919.17 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who purposely performed or induced or attempted to perform or include the abortion in violation of division (B) of section 2919.17 of the Revised Code.

(C) If a judgment is rendered in favor the defendant in a civil action commenced pursuant to division (B)(1) or (2) of this section and the court finds, upon the filing of a motion under section 2323.51 of the Revised Code, that the commencement of the civil action constitutes frivolous conduct

and that the defendant was adversely affected by the frivolous conduct, the court shall award in accordance with section 2323.51 of the Revised Code reasonable attorney's fees to the defendant.

2305.11 Time limitations for bringing certain actions; extensions; effect of legal disability.

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(C) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code, a civil action authorized by division (H) of section 2317.56 of the Revised Code, a civil action pursuant to division (B)(1) or (2) of section 2307.51 of the Revised Code for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of section 2919.15 of the Revised Code, and a civil action pursuant to division (B)(1) or (2) of section 2307.52 of the Revised Code for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) or (B) of section 2919.17 of the Revised Code shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion of division (A) or (B) of section 2919.17 of the Revised Code, within one year after the performance of the dilation and extraction procedure, or, in the case of a civil action pursuant to division (B)(2) of section 2307.51 of the Revised Code, within one year after the attempt to perform the dilation and extraction procedure.